

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
American Teleservices Association, Inc.)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling with Respect to)	DA 04-3185
Certain Provisions of the New Jersey Consumer)	
Fraud Act and the New Jersey Administrative Code)	

**SUPPLEMENTAL REPLY COMMENTS OF THE
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY**

By submitting this supplemental reply comment, the Attorney General of New Jersey reasserts his objections to the jurisdiction of the Federal Communications Commission (the "Commission") to decide the merits of the instant petition filed by the American Teleservices Association for a Declaratory Ruling (the "Petition") based on grounds of sovereign immunity and lack of jurisdiction, as set forth in his Motion Pursuant to 47 C.F.R. §1.41 to Dismiss the Petition on Grounds of Sovereign Immunity and Lack of Jurisdiction, filed on November 10, 2004 ("Motion"). He incorporates by reference his previous filings in this matter, including his Motion, Comments, filed November 17, 2004, Reply Comments, filed December 2, 2004 and Supplemental Comments, filed July 29, 2005. In addition, the Attorney General refers the Commission to his Comments filed on July 29, 2005 in response to the Petition of Alliance Contact Services, et al., for a Declaratory Ruling that the FCC has Exclusive Jurisdiction over Interstate Telemarketing, CG 02-278, Docket DA 05-1346 (the "Joint Petition"). However, having reviewed the comments

submitted in response to the Commission's reopening of the comment period on the Petition and the comments in response to the Joint Petition, the Attorney General of New Jersey submits this response in the event the Commission determines it has jurisdiction to decide the issues raised by the Petition and Joint Petition.

**THE STATES MAY LEGISLATE TO
PROTECT CONSUMERS' FREEDOM
FROM INTRUSION INTO THEIR HOMES**

It is settled law that citizens may regulate the messages that come into their homes. Consumers are not required to welcome unwanted speech into their homes, and States may legislate to protect this freedom.¹ In *FCC v. Pacifica Foundation*, the Court acknowledged that "in the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."² Indeed, the Court recognized that if a person receives an indecent phone call, he or she may hang up, but that remedy does not avoid the harm that has taken place.³

State Do Not Call laws are an appropriate exercise of the State's traditional police power, and its ability to protect its citizens through enactment and enforcement of consumer protection laws. These laws protect a consumer's right to be left alone in his or her home. By including their telephone numbers on the Do Not Call registry, consumers may elect not to receive calls and thus

¹ *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

² *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (citing *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970)).

³ *Id.* at 749.

protect their right of privacy. New Jersey's Do Not Call law has enabled New Jersey consumers to protect their right of privacy by significantly limiting the calls that a consumer may receive.

New Jersey consumers overwhelmingly support New Jersey's Do Not Call Law. Between November 10, 2004 and June 29, 2005, over 7,600 New Jersey consumers filed comments with the Commission in this proceeding. More than 99% of those consumers (7,561) asked the Commission to deny the Petition and allow state regulation to continue unfettered. Many of the consumers who commented during this time contend that state regulation is both appropriate and, in fact, necessary, to maintain the peace and quiet they have come to expect in their homes. Indeed, New Jersey consumers continue to file comments in this proceeding: since the reopening of the comment period on June 29, 2005, an additional 756 comments were filed by New Jersey consumers.

Even small business owners, who Petitioner alleges will be disproportionately negatively affected by trying to comply with varying state laws, have filed comments in favor of maintaining state regulation of interstate telemarketing. Some of the commenters, who identify themselves as being in the fields of advertising, marketing, or real estate, argue that there are methods other than telephone to contact clients, and the ability to have a peaceful home is far more important to them and their clients than anything else. A comment filed by a man who identified himself as a former owner of a market research firm briefly discussed the use of telephone interviews as a market research tool. He stated that over the years he has observed the abuse of the telephone by telemarketers who lied to consumers and made calls at unreasonable hours. He suggests that the "do not call" program must not be weakened by the Commission, and that the program must have "teeth" to accomplish its objectives. Another commenter identified himself as an independent business person who can appreciate the desire to have access to potential buyers. He noted, however,

that with freedom comes responsibility, including the responsibility to be responsive to individuals' needs and their desire to be left alone.

As at least one court has held, and as these commenters obviously recognize, the Do Not Call registry restricts only one avenue of contact with those on the list; sellers may still contact these consumers through direct mail or advertising in other media.⁴

The issue of a balance between the commercial needs of businesses and the privacy rights of consumers was recognized by several commenters. But, as these commenters argued, the telemarketers' concerns with complying with myriad state laws is outweighed by the consumers rights to "retain their right of privacy and to be left alone." One commenter, who identified himself as a "staunch capitalist," stated that "the ability of telemarketers to intrude uninvited into our homes via the phone line goes way beyond acceptable commercial 'rights'". He notes that he has the means to contact a commercial entity in the event he wants to conduct business. In closing, he notes that the New Jersey "program must be working if telemarketers are complaining."

Other commenters wrote to reinforce the Attorney General's contention that there is no reason for the Commission to preempt state telemarketing laws, and that there is a basis to find that the laws may appropriately harmonize. As a commenter who identified himself as a "former Federal regulator" stated:

I appreciate the subtle difference between the Federal and NJ laws, and fully understand the pre-emption tightrope FCC must walk. Notwithstanding, I ask you to let the NJ law stand. . . . I know FCC will be able to artfully craft a legally consistent and defensible position to preserve the NJ statute. . . .

⁴ *Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1243 (10th Cir. 2004).

In addition, as pointed out in several comments filed with the Commission, compliance with state laws by telemarketers is neither burdensome nor expensive. One commenter maintained that the computerized lists used by telemarketers enable them to comply with a minimum of effort, permitting them to segregate the lists by state and ensure compliance with that state's laws. Discussions with New Jersey corporations regarding compliance with Do Not Call Laws have borne out that contention, as they have informed State representatives of commercially available products at reasonable cost that ensure compliance with the varying state Do Not Call laws by blocking calls to individuals on the Do Not Call registry. Indeed, the State of Indiana submitted the Declaration of Ms. Mervat Olds, who details the availability of such products at little expense to telemarketers.⁵

As these commenters, and others, have indicated, telemarketers can comply with State laws with little effort. Compliance with state Do Not Call laws is no different than requiring companies that do business in a state to comply with the other applicable state laws. Companies have numerous methods available to them to make their products commercially available in a state, even if telemarketing were not an option. As commenters have noted, consumers are capable of finding the goods and services they need through mass communication, and there is no need for a consumer's telephone line to be used for commercial purposes. Moreover, the Do Not Call law provides avenues for consumers to receive calls from businesses if the consumer chooses to receive those calls.

The thousands of comments filed by New Jersey consumers, as well as consumers from other states, urge the Commission to recognize what the Attorney General has argued: that the states have always had, and should continue to have, the ability to enact and enforce laws regulating

⁵ Declaration of Ms. Mervat Olds, submitted on July 29, 2005 by the Attorney General of the State of Indiana in Docket No. 02-278, CG Docket Number 92-90.

telemarketing, both inter- and intra-state. “The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality. . .”⁶ The consumers’ right to be left alone in their homes far outweighs any commercial speech interests held by the telemarketers. The states are using their traditional police powers to protect consumers’ rights. In the event the Commission determines it has jurisdiction to decide the issues presented, the Commission should dismiss the petition and permit the States to continue their historic role protecting the individual’s right to be free from intrusion in his or her home.

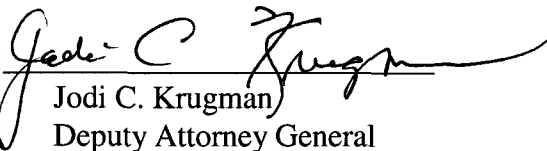
⁶ *Rowan, supra*, 397 U.S. at 737.

CONCLUSION

For all of the reasons set forth herein and in the filings referenced above, the Attorney General of New Jersey respectfully requests that the Commission dismiss the petition based on sovereign immunity and lack of jurisdiction, or, in the event that the Commission determines that it has jurisdiction to decide the matter, deny the relief requested and determine that the New Jersey Do Not Call Law and Regulations are not preempted by federal law.

Respectfully submitted,

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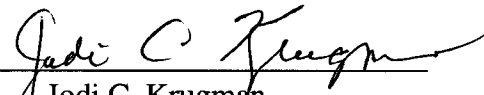
Dated: August 18, 2005

CERTIFICATE OF SERVICE

I, Jodi C. Krugman, do hereby certify that on this 18th day of August, 2005, a copy of the Supplemental Reply Comments of the Attorney General of New Jersey was filed electronically with the Commission and a copy was sent by regular mail to:

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